

1 David A. Lowe
2 LOWE GRAHAM JONES
3 701 Fifth Avenue, Suite 4800
4 Seattle, WA 98104
5 206.381.3300

6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON

8 ELF-MAN, LLC,

9 Plaintiff,

10 v.

11 RYAN LAMBERSON,

12 Defendants.
13

Civil Action No. 13-cv-00395 TOR

PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION TO
COMPEL

14 Defendant Ryan Lamberson's motion to compel should be denied on several
15 bases. Defendant's pursuit of this motion given the current posture of the case not only
16 is a waste of judicial and the parties' resources, but provides further evidence of
17 Defendant's counsel's sole purpose to unnecessarily drive up litigation expenses.

18 First, Plaintiff has moved to dismiss with prejudice all claims against Defendant
19 and further unconditionally confirmed that it will not enforce asserted Copyright
20 Registration No. PA 1-823-286, as set forth in the complaint, against this Defendant for
21 any act occurring prior to the present date. (ECF No. 59) For the reasons set forth in
22 Plaintiff's motion to dismiss, Defendant's declaratory judgment claims should likewise
23 be dismissed, resulting in a complete termination of this case. At this point there is no
24 legitimate justification for Defendant's failure to strike his motion to compel.

25 Second, even if otherwise justified in an effectively terminated case, Defendant's
26 motion is improper because his counsel failed to meet and confer in good faith with

1 Plaintiff's counsel of record on the discovery issue prior to moving to compel, as
 2 expressly required by LR 37.1(b). Notwithstanding any claimed communications
 3 Defendant's counsel may have had on this topic with prior counsel or record, or
 4 "non-appearing counsel," as of the filing of his motion Defendant had been made aware
 5 informally and via a formal Notice of Appearance (ECF No. 56) that new counsel was
 6 appearing in the case. Defendant had an obligation meet and confer in good faith with
 7 counsel of record prior to filing his motion. That was never done. (Lowe Dec. ¶ 2)
 8 Under the strict requirements of LR 37.1, Defendant's motion should not be heard.

9 Third, even if Defendant's motion was properly before the Court, it should be
 10 denied on the merits. The three discovery requests made by Defendant were objected to
 11 by prior counsel of record on privilege and/or work product bases. The timeliness of
 12 Plaintiff's objections is confirmed both by the original certificate of service
 13 accompanying the objections—indicating service was made via U.S. mail on May 22,
 14 2014—as well as by the accompanying declarations of prior counsel Maureen
 15 VanderMay and her legal assistance Meagan Sweeten. Defendant can only speculate as
 16 to the reason why the U.S. Postal Service postmark is dated later in time, and that
 17 speculation does not trump the declaration of counsel that it was properly and timely
 18 served. It would be truly unusual for a court to hold counsel responsible for the
 19 vagrancies of the U.S. Postal Service, and such exception is not warranted here.
 20 Plaintiff's objections were not waived and should be respected by Defendant, as has
 21 been repeatedly upheld by court decisions in this and other jurisdictions.¹

22
 23
 24 ¹ Plaintiff acknowledges that an exchange of privilege logs would be appropriate where
 25 privilege or work product is claimed. Counsel typically mutually agrees on the timing of such
 26 exchange, which was apparently not done in this case. Nevertheless, given the current posture of the
 case as effectively terminated, Plaintiff respectfully submits that there is no justification for the work
 and expense associated with producing a privilege at this juncture.

1 Lastly, even if all other conditions were met and the Court was faced with a
 2 reason at this stage to evaluate privilege or work product *in camera*, the character of the
 3 discovery would be confirmed. Contrary to Defendant's assertion, he is indeed seeking
 4 privileged or work product material. While it is true that prior counsel represented
 5 Plaintiff in this case, it is no less true by extension that counsel also represented
 6 Plaintiff's agents, which included its sales agent Vision Films, Inc. and manager APMC
 7 LLC. Defendant provides no legal authority mandating that attorney-client privilege is
 8 limited solely to parties named in a lawsuit, and such a position would be truly
 9 exceptional. Moreover, it is well known that apart from such privilege, the work
 10 product doctrine protects documents prepared in anticipation of litigation—precisely
 11 what Defendant seeks. Defendant's discovery requests are no more than a fishing
 12 expedition, having no relevance to the merits of the case, and because they implicate
 13 long-recognized exceptions to production provide no basis for compelling discovery.²

14 For the foregoing reasons, Plaintiff requests that Defendant's motion to compel
 15 be DENIED, and Plaintiff's pending motion to dismiss (ECF No. 59) be GRANTED
 16 and the case terminated.

17 RESPECTFULLY SUBMITTED this 30th day of June, 2014.

18 s/David A. Lowe, WSBA No. 24,453

19 Lowe@LoweGrahamJones.com

20 LOWE GRAHAM JONES^{PLLC}

21 701 Fifth Avenue, Suite 4800

22 Seattle, WA 98104

23 T: 206.381.3300

24 F: 206.381.3301

25 Attorneys for Plaintiff Elf-Man, LLC

26 ² The investigator cases cited by Defendant are not on point as none of the requests are directed to the investigators, but rather agents of Plaintiff.



CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on June 30, 2014 to all counsel or parties of record who are deemed to have consented to electronic service via the Court's CM/ECF system.

s/ David A. Lowe